

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARJORIE OGILVIE.

CASE NO. C18-0718JLR

Plaintiff,

ORDER

V.

THRIFTY PAYLESS, INC., et al.,

Defendants.

I. INTRODUCTION

Before the court is Defendant Assa Abloy Entrance System US, Inc.’s (“Assa Abloy”) motion for summary judgment. (MSJ (Dkt. # 69).) Plaintiff Marjorie Ogilvie and Defendant Thrifty Payless, Inc. (“Rite Aid”) both oppose the motion. (Rite Aid Resp. (Dkt. # 72); Ogilvie Resp. (Dkt. # 74).) The court has considered the motions, the parties’ submissions in support of and in opposition to the motions, and the applicable

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1 law. Being fully advised,¹ the court GRANTS Assa Abloy's motion for summary
 2 judgment.

3 **II. BACKGROUND**

4 The court laid out the background of this case in its previous order on Rite Aid's
 5 motion for summary judgment. (See 1/14/21 Order (Dkt. # at 2-4).) It lays out the facts
 6 most relevant to the instant motion below.

7 **A. Factual Background**

8 On the morning of August 29, 2015, Ms. Ogilvie was approaching a Rite Aid in
 9 Arlington, Washington ("the Store"), when the sidelite² of the Store's automatic door
 10 flung open and struck her in the head. (Am. Ogilvie Resp. (Dkt. # 55), Ex. A ("Ogilvie
 11 Decl.") ¶¶ 1-2.) Ms. Ogilvie fell backward, landed on the pavement, and sustained
 12 several injuries. (*Id.* ¶¶ 3-4.) The door in question was an automatic sliding door with a
 13 sidelite on each end. (Martin Decl. (Dkt. # 50) ¶ 3.) While the door does not normally
 14 open by swinging in or out, there is a breakaway mechanism that allows the door to
 15 swing open in emergency circumstances. (*Id.* ¶ 4.)

16 At the time of the incident, Rite Aid contracted with Assa Abloy to perform
 17 general maintenance at the store and to respond to maintenance requests regarding the
 18 door. (10/2/20 Lancaster Decl. (Dkt. # 51) ¶ 3, Ex. 2; Goldman Decl. ¶ 4, Ex. 3 ("Service
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20 ¹ Assa Abloy requests oral argument (*see* MSJ at 1), but the court finds oral argument
 21 unnecessary to its disposition of the motion, *see* Local Rules W.D. Wash. LCR 7(b)(4).

22 ² Sidelites for automatic sliding doors are the glass panes on either side that the door
 slides behind when it opens in its normal fashion. (See Goldman Decl. (Dkt. # 70) ¶ 11, Ex. 10.)

1 | Agreement”.) Assa Abloy would conduct planned maintenance once a year after Rite
 2 | Aid issued a work order for that maintenance. (Goldman Decl. ¶ 3, Ex. 2 (“Flock Dep.”)
 3 | 23:21-24:21.) Assa Abloy states that the last time it provided maintenance to the door
 4 | was September 18, 2014. (MSJ. at 3; *see also* Flock Dep. 25:1-26:4.) Rite Aid points to
 5 | a scheduled work order that it reported on August 1, 2015 in which Assa Abloy
 6 | “committed to work related to the door not being ANSI complaint [sic].” (Rite Aid Resp.
 7 | at 3; Goldman Decl. ¶ 6, Ex. 4 (“Work Order”.) According to Assa Abloy, “[i]t appears
 8 | that the date on this work order is likely incorrect . . .” (MSJ at 3 n.3.)

9 | At the time of the September 18, 2014, maintenance visit, Assa Abloy discussed
 10 | the door’s daily safety checklist with Rite Aid. (Goldman Decl. ¶ 2, Ex. 1 (“Myers
 11 | Dep.”) at 20:15-21:2.) This daily safety checklist instructed Rite Aid to conduct a series
 12 | of minimum safety checks on the door every day. (*Id.*; Goldman Decl. ¶ 6, Ex. 5 (“Daily
 13 | Safety Checklist”) at 3.)

14 | The parties all agree that there was a windstorm in the Seattle area on August 29,
 15 | 2015, and that a gust of wind appears to have blown the sidelite into Ms. Ogilvie’s head.
 16 | (*See* MSJ at 4, 5; Rite Aid Resp. at 3; Ogilvie Resp. at 1, 5.)³

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³ Assa Abloy contends that “August 29, 2015 was the greatest windstorm on record in the
 21 | Seattle area in history, with winds of 50-65 MPH.” (MSJ at 4 (citing Goldman Decl. ¶¶ 8-9, Exs.
 22 | 7-8.) The court notes that the exhibit submitted by Assa Abloy reports that this was “the
 23 | greatest August windstorm on record” not the greatest overall windstorm recorded in the area,
 24 | and that wind speeds “were on par with some of the stronger storms Western Washington
 25 | typically receives in the late fall and winter . . .” (Goldman Decl. Ex. 7 at 1, 4; *see also* *id.* Ex.
 26 | 8 at 20 (describing “strongest August windstorm”).)

B. Previous Motion for Summary Judgment

This is the second motion for summary judgment in this case. In October 2020, Rite Aid filed a motion seeking summary judgment because Ms. Ogilvie alleged the door was improperly designed, manufactured, or installed, and Rite Aid had done none of these three actions. (Rite Aid MSJ (Dkt. # 49) at 3.) The court denied Rite Aid's motion because Ms. Ogilvie brought her suit against Rite Aid and Assa Abloy based on a theory of negligence and premises liability and there were genuine issues of material fact as to whether or not Rite Aid had notice of the potential danger posed by the door. (1/14/21 Order at 7-8.)

III. ANALYSIS

Assa Abloy contends that it is entitled to summary judgment because it did not owe a duty to Ms. Ogilvie and thus cannot be found negligent. (MSJ at 6-8.) The court first lays out the relevant legal standard before addressing Assa Abloy's arguments.

A. Legal Standard

Summary judgment is appropriate if the evidence viewed in the light most favorable to the non-moving party shows “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Beaver v. Tarsadia Hotels*, 816 F.3d 1170, 1177 (9th Cir. 2016). A fact is “material” if it might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is “genuine” only if there is sufficient evidence for a reasonable fact finder to find for the

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1 non-moving party.” *Far Out Prods., Inc. v. Oskar*, 247 F.3d 986, 992 (9th Cir. 2001)
 2 (citing *Anderson*, 477 U.S. at 248-49).

3 The moving party bears the initial burden of showing there is no genuine dispute
 4 of material fact and that it is entitled to prevail as a matter of law. *Celotex*, 477 U.S. at
 5 323. If the moving party does not bear the ultimate burden of persuasion at trial, it can
 6 show the absence of such a dispute in two ways: (1) by producing evidence negating an
 7 essential element of the nonmoving party’s case, or (2) by showing that the nonmoving
 8 party lacks evidence of an essential element of its claim or defense. *Nissan Fire &*
 9 *Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000). If the moving party
 10 meets its burden of production, the burden then shifts to the nonmoving party to identify
 11 specific facts from which a factfinder could reasonably find in the nonmoving party’s
 12 favor. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 250

13 **B. Existence of a Duty**

14 Ms. Ogilvie’s brings her suit against Assa Abloy based on a theory of negligence
 15 and premises liability. (See Am. Compl. (Dkt. # 21) ¶ 8 (alleging Ms. Ogilvie suffered
 16 injuries “due to [Rite Aid and Assa Abloy’s] negligence and premises liability,” and that
 17 Defendants are jointly and severally liable).) She specifically alleges that Assa Abloy
 18 “designed and/or manufactured and/or installed or had installed the sliding glass door that
 19 injured [Ms. Ogilvie]” and that “these three things were done in a negligent and/or
 20 improper and or grossly negligent manner” (*Id.* ¶¶ 6-7.) Assa Abloy provides
 21 uncontested evidence that it did not design, manufacture, or install the door. (Myers Dep.
 22 at 8:16-23; Myers Decl. (Dkt. # 71) ¶¶ 4-7; *see generally* Ogilvie Resp. (not contesting

1 these facts); Rite Aid Resp. (same).) It also contends that it did not owe a duty to patrons
 2 of the Store because it did not own, posses, or control the Store; was not at the Store on a
 3 daily or regular basis; and only came to the Store when Rite Aid requested it to be there.
 4 (MSJ at 7.) Both Ms. Ogilvie and Rite Aid oppose Assa Abloy's motion, and the court
 5 addresses each parties' arguments below. (See Ogilvie Resp.; Rite Aid Resp.)

6 1. Ms. Ogilvie's Response

7 Ms. Ogilvie presents three arguments against Assa Abloy's motion. She argues
 8 that (1) she is entitled to an inference of negligence under the doctrine of *res ipsa*
 9 *loquitur*, (2) granting Assa Abloy's motion would be inconsistent with the court's
 10 previous order, and (3) Assa Abloy could be found negligent for failing to provide notice
 11 of the door's breakaway function. The court analyzes each of her arguments in turn.

12 First, Ms. Ogilvie argues that she is entitled to an inference of Assa Abloy's
 13 negligence due to the doctrine of *res ipsa loquitur*.⁴ (Ogilvie Resp. at 2-3.) Under *res*
 14 *ipsa loquitur*, a plaintiff is entitled to an inference of negligence if three elements are met:

15 (1) the accident or occurrence producing the injury is of a kind which
 16 ordinarily does not happen in the absence of someone's negligence, (2) the
 17 injuries are caused by an agency or instrumentality within the exclusive
 18 control of the defendant, and (3) the injury-causing accident or occurrence is
 19 not due to any voluntary action or contribution on the part of the plaintiff.

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 21 Tinder v. Nordstrom, Inc., 929 P.2d 1209, 1212 (Wash. 1997).

22 ⁴ While her complaint asserts a theory of negligence and premises liability against both
 23 Defendants, Ms. Ogilvie raises no arguments regarding premises liability in her response to Assa
 24 Abloy's motion. (Am. Compl. ¶ 8; *see generally* Ogilvie Resp.)

1 “*Res ipsa loquitur* is ‘ordinarily sparingly applied, in peculiar and exceptional
2 cases, and only where the facts and the demands of justice make its application
3 essential.’” *Nguyen v. City of Seattle*, 317 P.3d 518, 527 (Wash. Ct. App. 2014) (quoting
4 *Curtis v. Lein*, 239 P.3d 1078, 1081 (Wash. 2010)). Thus, Washington courts have
5 declined to apply it in a variety of situations. *See Tinder*, 929 P.2d 1209 (malfunctioning
6 escalator); *Curtis*, 239 P.3d 1078 (collapsing dock); *A.C. ex rel. Cooper v. Bellingham*
7 *School Dist.* 105 P.3d 400 (Wash. Ct. App. 2004) (teacher striking student with piñata
8 bat); *Jackass Mt. Ranch, Inc. v. S. Columbia Basin Irr. Dist.*, 305 P.3d 1108 (Wash. Ct.
9 App. 2013) (landslide caused by water seepage from irrigation wastewater).

10 Washington law recognizes three categories of situations where the first prong of
11 *res ipsa loquitur* is satisfied. *Id.* at 1212 (citing *Hughes v. King County*, 714 P.2d 316,
12 320 (Wash. Ct. App. 1986)). The first is if the act that resulted in the injury “is palpably
13 negligent, such as [a doctor] leaving foreign objects in a patient.” *Id.* The second occurs
14 “when general experience teaches that the result would not be expected without
15 negligence.” *Id.* The third is if “proof by experts in an exotic field creates an inference
16 that negligence caused the injuries.” *Id.*

17 Ms. Ogilvie does not refer to any facts demonstrating “palpable negligence” or
18 submit any proof by experts that would support an inference that negligence caused the
19 injuries. (*See* Ogilvie Resp. at 3.) The court must presume, then, that she intends to
20 invoke the second category of situations in which *res ipsa loquitur* may apply. But her
21 argument in support is comprised of two sentences that assert that her injury must be the
22 result of negligence because otherwise “a flood of cases would overwhelm courts in

1 regions of the country where extreme windstorms such as the one we had in Seattle in
 2 [sic] the norm.” (*Id.* (citing no authority or facts).)

3 In contrast to Ms. Ogilvie’s unsupported assertion, Assa Abloy provides
 4 uncontested evidence that it did not design, manufacture, or install the door. (Myers Dep.
 5 at 8:16-23; Myers Decl. (Dkt. # 71) ¶¶ 4-7.) It also provides uncontested evidence that,
 6 per its service agreement with Rite Aid, it provided annual maintenance on the door and
 7 responded to requests for repairs on an as-needed basis. (Flock Dep. 23:21-24:21;
 8 Service Agreement.) Ms. Ogilvie also does not contest Assa Abloy’s assertions that the
 9 door met all applicable safety standards and requirements or that the door’s breakout
 10 function, which allowed the sidelites to be pushed open, was required in order to meet
 11 fire code and ADA requirements.⁵ (*See generally* Ogilvie Resp.; Myers Decl. ¶¶ 7-8.)
 12 Neither Rite Aid nor Ms. Ogilvie allege that Assa Abloy failed to perform any of its
 13 obligations to maintain the door. (*See generally* Am. Compl.; Ogilvie Resp.; Rite Aid
 14 Resp.)

15 Based on these uncontested facts, the court finds that Ms. Ogilvie may not
 16 properly invoke *res ipsa loquitur* against Assa Abloy. The incident in question is not, by
 17 its nature, of a kind that would only occur had Assa Abloy been negligent. *See Tinder*,
 18 929 P.2d at 1212. Thus, this is not one of the “peculiar and exceptional cases” in which
 19 *res ipsa loquitur* applies. *See Nguyen*, 317 P.3d at 527.

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 22 ⁵ Indeed, in her expert disclosures Ms. Ogilvie lists Mr. Myers as an expert witness in the
 door’s function who will testify that “[t]he wind has the ability to blow out the sidelites as it did
 on the day of the incident . . . and this is how the door is designed to function.” (Ogilvie Expert
 Disclosures (Dkt. # 68) at 4.)

1 Second, Ms. Ogilvie argues that, because the court previously found that genuine
2 issues of material fact existed in regard to her claim against Rite Aid, “it would be
3 improper to allow Assa Abloy to escape liability by relying on somewhat similar
4 defenses as Rite Aid.” (Ogilvie Resp. at 4.) However, the genuine issue of material fact
5 that Ms. Ogilvie references is whether Rite Aid was on notice of the door’s danger to
6 patrons because it had blown open on August 29, 2015, before Ms. Ogilvie arrived at the
7 store. (1/14/21 Order at 7-8.) She makes no argument connecting this issue of material
8 fact to Assa Abloy’s alleged liability, and the court sees no reason why its previous ruling
9 should weigh against Assa Abloy’s instant motion. (*See generally* Ogilvie Resp.)

10 Finally, in a two-sentence paragraph devoid of any citations to the record or law,
11 Ms. Ogilvie contends that if *res ipsa loquitur* does not apply, Assa Abloy “could be
12 found negligent for failing to provide proper notice of the door’s break-out [sic] function
13 to Rite Aid.” (*Id.* at 4.) She does not explain this theory of liability in more detail in any
14 of her filings or cite any law in support of it. (*See* Am. Compl.; Ogilvie Resp.; *see*
15 *generally* Dkt.) This theory also appears to be directly contradicted by her arguments
16 against Rite Aid’s motion for summary judgment, where she contended that “Rite Aid
17 employees knew about the emergency breakout function of the door since the inspection
18 form noted the function, and the form was signed by Rite Aid employees.” (Ogilvie
19 Resp. to Rite Aid MSJ (Dkt. #53) at 5.) The court will not allow Ms. Ogilvie to allege
20 this new theory of liability at the summary judgment stage when she provides no
21 supporting facts and has recently argued directly against this theory. *See Coleman v.*
22 *Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000) (refusing to allow plaintiff to

1 adopt new legal theory at summary judgment stage); *Wasco Prod., Inc. v. Southwall*
 2 *Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (“[S]ummary judgment is not a procedural
 3 second chance to flesh out inadequate pleadings.”).

4 2. Rite Aid’s Response

5 Rite Aid contends that Assa Abloy cannot avoid premises liability “merely
 6 because it was not present at the time of the incident.” (Rite Aid Resp. at 4.) In support,
 7 it cites *Kamla v. Space Needle Corp.*, 52 P.3d 472, 474 (Wash. 2002), for the proposition
 8 that non-employee agents may be held liable for injuries that occur on a premises. (*Id.* .)
 9 In *Kamla*, a contractor setting up a New Year’s Eve fireworks display was injured when a
 10 moving elevator snagged his safety line. *Kamla*, 52 P.3d at 474. *Kamla* involved the
 11 duties owed by a landowner to a contractor’s employee when that employee was working
 12 on a jobsite controlled by the contractor at the time of the injury. *See id.* Rite Aid makes
 13 no attempt to explain how *Kamla* is relevant in this case and the court fails to see how it
 14 supports Assa Abloy’s potential liability. Rite Aid provides no other legal authority to
 15 support its argument that Assa Abloy is liable under a theory of premises liability. (*See*
 16 *generally* Rite Aid Resp.)

17 Rite Aid also argues that because Rite Aid contracted with Assa Abloy to inspect
 18 and maintain the door and ensure that it complied with industry standards, “any issues
 19 with the door were under the purview of Assa [Abloy].” (Rite Aid Resp. at 4.) But, like
 20 Ms. Ogilvie, Rite Aid does not contest that the door met all applicable safety standards
 21 and requirements, or that the door’s breakout function was required in order to meet fire
 22 code and ADA requirements. (*See generally* Rite Aid Resp.) Indeed, Rite Aid relies on a

1 declaration from an architect who states that Assa Abloy “serviced and maintained [the
 2 door] in a manner and frequency that is consistent with applicable standards.” (Martin
 3 Decl. ¶ 7.) In the absence of any specific facts or allegations that Assa Abloy inspected,
 4 repaired, or ensured compliance in a negligent manner, Rite Aid’s argument appears to be
 5 the same as Ms. Ogilvie’s: an inference of negligence on the part of Assa Abloy can be
 6 drawn from the circumstances of the incident. As the court describes above, this doctrine
 7 is known as *res ipsa loquitur*, and the record does not support its application against Assa
 8 Abloy. *See supra* § III.B.1. Thus, Rite Aid’s arguments against Assa Abloy’s motion are
 9 unavailing.

10 In sum, Assa Abloy has demonstrated that the Ms. Ogilvie lacks evidence of an
 11 essential element of her negligence claim against it and it is, therefore, entitled to
 12 judgment as a matter of law. *See Nissan Fire*, 210 F.3d at 1106; *Celotex*, 477 U.S. at
 13 324. Accordingly, the court GRANTS Assa Abloy’s motion for summary judgment.⁶

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20 ⁶ Assa Abloy also argues that the windstorm that blew open the door causing it to strike
 21 Ms. Ogilvie was an “Act of God,” and therefore outside the realm of foreseeability. (*Id.* at 8.)
 22 Because the court finds that Assa Abloy is entitled to summary judgment based on its arguments
 regarding the existence of a duty, it does not reach the question of whether the windstorm in
 question was an “Act of God.”

IV. CONCLUSION

For the foregoing reasons the court GRANTS Assa Abloy's motion for summary judgment (Dkt. # 69).

Dated this 26th day of April, 2021.



JAMES L. ROBART
United States District Judge